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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 379

RAYMOND J. HANSEN, DEE CLARK, LOUISE SAFARIK, ERNEST G. ERICKSON, R. W. SAFARIK, O. C. SAFARIK, RICHARD M. FERGUSON, RICHARD P. DE SMET,
Petitioners.

v.

STEWART L. UDALL, Secretary of the Interior, and ROBERT S. LIGHT, Et Al.
Respondents,

and

LOUISE SAFARIK, RICHARD P. DE SMET,
Petitioners,

v.

STEWART L. UDALL, Secretary of the Interior
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners, addressing themselves to the Court through their counsel, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered on June 7, 1962.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals has not been officially reported. A copy is set forth in the Appendix, *infra*. The United States District Court for the District of Columbia did not write an opinion.

JURISDICTIONAL STATEMENT

The judgment of the Court below, affirming the District Court, bears date of June 7, 1962 and was entered on June 7, 1962. A true copy is set out Appendix, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254 (1).

QUESTIONS PRESENTED

1. Whether a decision by the Department of the Interior may be made of prospective effect only because of a prior contrary advisory opinion by a subordinate officer where the governing statute is clear and has been so found by the Secretary and where the Secretary never found the overruled prior opinion to be reasonable or permissible. Involved in this question is the following subsidiary question:

(a) Whether the Court below had the right when reviewing agency action on the submitted administrative record, to substitute its judgment for the agency and supply the missing basic finding that the overruled advisory opinion was reasonable and permissible.

2. Whether an administrative ruling may be made of prospective effect only where the ruling itself ends the jurisdiction of the administrative body over the subject matter.

3. Whether a ruling may be made of prospective effect only where the prospective effect destroys intervening rights. (1)

CONSTIUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Article IV, Sec. 3, cl. 2 of the United States Constitution states:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

Section 30(a) of the Mineral Leasing Act of 1920 relating to assignments, which was added by the Amendatory Act of

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(1) In the event the petition is granted, petitioners reserve the right to argue additional points set out *infra* at pages 12, 13.

August 8, 1946, 60 Stat. 955, 30 U.S.C. (1952 ed) Sec 187a reads in part as follows:

> ". . . any oil or gas lease issued under the authority of this Act may be assigned or subleased . . . and any assignment or sublease shall take effect as of the first day of the lease month following the date of filing in the proper land office . . . Assignments under this section may be made of parts of leases which are in their extended term because of production, and the segregated lease of any undeveloped lands shall continue in full force and effect for two years and so long thereafter as oil or gas is produced in paying quantities."

The last sentence in Section 30(a) was amended by the Act of July 29, 1954, 68 Stat. 583, 585, 30 U.S.C. (1958 ed) Sec 187a, to read as follows:

> "Assignments under this section may also be made of parts of leases which are in their extended term because of any provision of this Act. The segregated lease of any undeveloped lands shall continue in full force and effect for two years and so long thereafter as oil or gas is produced in paying quantities . . . "

Section 17 of the Mineral Leasing Act of 1920, 41 Stat. 437, 443, as amended, 30 U.S.C. Section 226 reads in part as follows:

> "All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits may be leased by the Secretary of the Interior . . . When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding . . . "

Since 1946 the following regulation 43 C.F.R. 192.140 was in effect:

> "Subject to final approval by the Bureau of Land Management, assignments or subleases shall take effect as of the first day of the lease month following the date of filing in the proper land office . . . "

STATEMENT OF THE CASE

The petitioners in two suits applied to the U. S. District Court for the District of Columbia to review final decisions of the Secretary of the Interior rejecting their applications for oil and gas leases on the public domain. As is usual, the review was limited to matters of law based upon a completed and undisputed administrative record. The District Court consolidated the cases, denied the petitioners' motions for summary judgment and granted summary judgment to the respondents. Appeal followed to the United States Court of Appeals for the District of Columbia Circuit where the District Court was affirmed in an opinion consolidating a number of cases.

The jurisdiction of the District Court was invoked under Title II, section 306 of the District of Columbia Code; Section 10 of the Administrative Procedure Act, U.S.C. sec 1009; under the Declaratory Judgment Act and under 28 U.S.C. sections 1331 and 1332. The jurisdiction of the Court below rested on 28 U.S.C. section 1291.

Pursuant to the Mineral Leasing Act of 1920, as amended, a number of oil and gas leases were issued for five years, and further extended for an additional five years. In the last month of the last year (10th year) of the terms of the leases, the lessees filed partial assignments of the leases (that is, assignments of part of the leased lands) for the purpose of securing a further extension of two years for the area assigned in each lease and for the area retained in each lease. (Joint App. 32a, b, c, d, e, 34, 35, 45, 57, 4, 65). (2)

The authority for two year extensions, based upon approved partial assignments, is found in the July 29, 1954

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(2) References to Joint Appendix or to Jt. Appendix are to the Joint Appendix below.

amendment to Section 30(a) of the Mineral Leasing Act, 30 U.S.C. Section 187a which provided that *if approved* a partial assignment of undeveloped lands would result in a two year extension for the area assigned and for the area retained, and so long thereafter as oil and gas is produced in paying quantities. Section 30(a) of the Mineral Leasing Act did not authorize the filing and the approval and the extension of a lease based upon a partial assignment filed in the last month of the last year of the lease. To the contrary, Section 30(a) of the Mineral Leasing Act states that no assignment can take effect until the first day of the next lease month following the date of filing, which plainly means, as found by the Secretary on many occasions, that there be at least one full month remaining in the term of the lease after the filing of the assignment.

However, until the Secretary ruled in the *Franco Western* case of August 11, 1958, two year extensions were granted even though the partial assignments were filed in the last month of the last year of the lease, and even though contrary to the statutory prohibition contained in Section 30(a) of the Leasing Act which required that there be at least one full "lease month" remaining in the term of the lease.

The stated authority for approving such assignments filed in the last month of the last year was an advisory opinion of June 4, 1957, (unreported) from the Associate Solicitor, Division of Public Lands, to the Chief, Conservation Division, Geological Survey, Department of the Interior. (Joint App. 47, 48, 49). It is to be noted, however, that while the leases which conflict with the Appellants' offers were extended by virtue of partial assignments filed in the last month of the last year, this practice was not uniformly followed and many lessees elected to file their partial assignments in the next to last month and thus avoided the legal question surrounding the filing of partial assignments in the last month of the last year. (Joint App. 57. 68, 69).

While this state of affairs existed in the Department, the case of *Franco Western Oil Company, et al.* was reached by the Secretary for decision on appeal from the Director of the Bureau of Land Management. It is to be noted that, with a single exception, the administrative appeals in this *Franco Western* case commenced and were in process well prior to the

filing dates of all of the partial assignments which led to the illegal extensions involved in this dispute. (Joint App. 32a, b, c, d, e, 4). This was the first occasion in which the Department was called upon to examine the legal question raised in an actual case and controversy brought to the attention of the Department by way of appeal. In this case, Franco Western Oil Company and Raymond J. Hansen, offerors for a lease, urged that the procedure of approving assignments filed in the last month of the last year and granting a two year extension based upon such partial assignments, was contrary to law; that the ineffective assignment could not have extended the lease; that the lease expired by operation of law, and that the land was open for filing when they filed their offers to lease. In his decision of August 11, 1958, (Joint App. 10 to 16, inc.) the Secretary applied the statute, agreed completely with Franco Western and Hansen and ruled that an assignment must have been filed while there was at least one full "lease month" remaining in the term of the lease; held that the assignment never took effect; that the lease had expired by operation of law at the end of its 10th year and that the offers of Franco Western and Hansen covered land available for leasing and should not have been rejected. It is to be noted that the Secretary has ruled on many occasions that when a lease expires by operation of law, that is, by the ending of its term, the Department no longer has any jurisdiction of any kind over the lease for it is dead. The Secretary specifically ruled that the advisory opinion of June 4, 1957, by the Associate Solicitor (Joint App. 47, 48, 49) was contrary to statute and must be overruled. This decision, of course, was applied retroactively. Based upon this decision, which was duly reported, the Appellants filed their offers to lease. (Joint App. 32a, b, c, d, e, 3). These offers covered lands which were, or had been, in leases which had been extended for two years beyond the 10 year term by virtue of partial assignments filed in the last month of the 10th year, precisely the situation ruled upon by the Secretary in his August 11, 1958, decision. The Appellants' position was that lands filed on were available for leasing. Anyone, in addition to the Appellants, could have filed offers for such lands, including those lessees whose leases fell within the ban of the August 11th decision.

After the Appellants had filed their offers, the Secretary reconsidered the August 11th decision based upon a request for reconsideration by the Acting Director of the Bureau of Land Management, and issued on September 30, 1958, a *Supplemental Franco Western Oil Company, et al* decision. In this Supplemental decision, the Secretary adhered to the law of the August 11th decision, but ruled that the August 11th decision would be applied prospectively only; that no partial assignment filed in the last month of the last year after August 29, 1958, would be approved, but that extensions previously granted based upon partial assignments filed in the last month of the last year would not be disturbed. The Secretary then decided that the favorable ruling for Franco Western and Raymond J. Hansen in its August 11, 1958 decision must also be undone, since the partial assignment in that case was filed prior to August 29, 1958, and ordered that the offers of Franco Western Oil Company and Raymond J. Hansen must be rejected. (Joint App. 16 to 22 inc.).

Raymond J. Hansen then filed Cause No. 2810-59 in the United States District Court for the District of Columbia. On July 19, 1960, Youngdahl, J., ruled for Hansen and ordered that Hansen's offer to lease should not have been rejected. (Joint App. 46, 47). Apparently, Franco Western Oil Company did not pursue the matter in Court. No appeal was taken by the Secretary of the Interior from the adverse decision by Judge Youngdahl.

In due course, based solely upon the Supplemental Franco Western decision, the Appellants' offers were finally rejected by the Secretary of the Interior.

In neither the August or September decisions did the Secretary find that the pertinent provision of the statute was ambiguous or that the Associate Solicitor's opinion was a reasonable or permissible one. In fact, the rationale and conclusion of the Associate Solicitor's opinion were clearly contrary to established precedent as pointed out by the Secretary in the August decision. The Secretary prior to and after found the particular statutory provision to be "clear", that is, in order to approve an assignment there must be at least one full "lease month" remaining in the term of the lease after the filing of the assignment. The Court below while expressly accepting the

Secretary's construction of the statute nevertheless made a finding that the Associate Solicitor's opinion was "not a non-permissible or an unreasonable one". (Appendix, infra, p. 24.)

REASONS FOR GRANTING THE WRIT

The matter before the Court is of special and continuing importance because the opinion of the Court of Appeals conflicts with established principles of Federal Administrative Law set at rest by this Court and departs from the settled norms and standards guiding judicial review of administrative agencies. The Secretary clearly violated the statute when he decided to make a ruling of prospective effect only after first deciding it would operate retroactively. The Court below found it necessary to go beyond the record and make a basic finding not only not supported by the record but contrary to precedent established by the Secretary and contrary to the pertinent statute which the Secretary has always deemed to be clear.

This case presents other unusual circumstances in that the Secretary first ruled retroactively, then in a subsequent decision changed his mind to make the decision of prospective effect only, but in the meantime the rights of the petitioners intervened. Thus the second decision *retroactively* destroyed the petitioners' rights which had intervened. This case also poses an unusual problem in the field of retroactive or prospective application of an *ad hoc* decision, the question being, does an administrator have any choice or any right to make *the effect of a ruling prospective only* where the ruling itself ends his jurisdiction over the subject matter. In addition to the foregoing, the decision of the Court below appears to plainly conflict with applicable decisions of this Court for it is well established that there is no choice or question of prospective or retroactive application when the pertinent statute clearly settles the point of law involved, especially so where even the Administrator has agreed the law to be clear.

Although this case specifically involves the question of whether or not two year extensions should have been granted, the basic statute involved is Sec. 30(a) of the Mineral Leasing Act, 30 U.S.C. (1952 ed.) Sec 187a (statute reads the same today as it has since August 8, 1946) which governs approval of assignments. The assignment must first be approved in order

to have the extension. The statute and the pertinent regulation 43 C.F.R. 192.140 state that an assignment can only take effect the first day of the lease month following the date of filing, that is, as frequently stated, there must be one full "lease month" remaining in the term of the lease.

1. It is axiomatic that the Secretary of the Interior, or any administrator, has no alternative in face of an unequivocal expression of Congress; he must respect and apply the statute regardless of any contrary practice. *United States v. City and County of San Francisco*, 310 U.S. 16; *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129. The petitioners submit that the statute, Sec 30(a) of the Mineral Leasing Act, *supra*, and the regulation, *supra*, clearly state that an assignment can be effective only from the first day of the lease month following the date of filing. Accordingly when an assignment is filed in the last month of the lease term, there can be no first day of the lease month following its filing upon which the assignment can take effect.

The compelling argument is that the Secretary has ruled on many occasions that the statute means just exactly what the petitioners state it means. *Albert C. Massa*, et al., 62 I.D. 339 (1955); *Morton Oil Company*, 63 I.D. 393 (1956). In the first *Franco Western* decision of August 11, 1958, (Joint App. 14, 15), the Secretary ruled without any doubt as to what the statute meant. He did not change it in the second decision (Joint App. 16-22). After the *Franco-Western* decisions, in the case of *Mike Abraham*, A-28163, November 16, 1959, (*infra*, Appendix p. 31), the Secretary particularly commented on the previous Franco-Western decisions and the particular statutory provision stating "the plain wording of the statute" required that "unless there is at least one full lease month remaining in the term of the base lease when a partial assignment thereof is filed there is no date on which an assignment can take effect" and the lease would terminate by operation of law prior to the date when the assignment could become effective. Also, significantly, in this same decision, the Solicitor ruled that "there is nothing inconclusive" about the first *Franco-Western* decision nor did the second decision "change the rule announced in the first decision."

It would seem quite clear the Secretary's own decisions are binding upon him as to the meaning of the statute. The statute being clear, as admitted by the Secretary, the petitioners submit that there was no authority in the Secretary to make the ruling prospective only.

(a) No where in the Franco-Western decisions did the Secretary find the controlling statute ambiguous or the overruled Associate Solicitor's opinion a reasonable one or a permissible one. In fact, as shown above, the Secretary has held to the contrary. In the first *Franco-Western* decision (Joint App. 14 and 15) the Secretary went to some lengths to point out from his previous decisions and general law, *86 C.J.S. Time Sec 16* and from the statute that the Associate Solicitor was plainly wrong in his opinion of June 1957 and that the decision relied on by the Associate Solicitor, the *Humble* case, was no authority for the Associate Solicitor's opinion. Yet the Court of Appeals while specifically accepting the construction of the statute by the Secretary, proceeded to supply a basic finding that the Associate Solicitor's opinion "was not a non-permissible or an unreasonable one". There is no support for this necessary or basic finding in the administrative record, nor can such a finding be implied, for the Secretary has ruled that the statute and the regulation clearly require that there be at least one full lease month remaining in the term of the lease when an assignment is filed in order for the assignment to be approved. The action of the agency must be measured by what it did and judged on the grounds invoked by the agency. *Securities & Exchange Comm. v. Chenery Corp.*, 318 U.S. 80, 93; 332 U.S. 194, 196.

The general rule is, of course, that a Court is confined on review proceedings to the record made and the responsible or basic findings must be made by the agency, *Chenery* case, *supra*, 318 U.S. 80, 94; nor can a basic finding be implied from the ultimate finding, *2 Administrative Law Treatise*, Davis, Sec 16.07, p. 455, particularly where the record and precedents are contrary to any such implication.

The petitioners believe that the Court below had no right to make the finding that the overruled opinion was reasonable and permissible.

(2) Although in the second *Franco Western* decision, the Secretary changed his mind and decided to make the *effect* of the rule prospective only, the Secretary did not change the rule of law stated in the first decision, namely, that for an assignment to be effective, there must be at least one full "lease month" remaining in the term of the lease (Jt. App. 14). He could not change it even if he so desired for it is statutory and it is embodied in one of his own regulations, *43 C.F.R. 192.140*. The inevitable conclusion of being unable to approve an assignment and thus being unable to grant the extension is that the lease expired by operation of law. This the Secretary found in the first *Franco Western* case. (Jt. App. 14, 15). In the *Mike Abraham* decision of 1959 mentioned above and *infra*, Appendix p. 29, the Secretary when he commented on the *Franco-Western cases*, stated at page 31 of the Appendix:

> "There is nothing inconclusive about the decision of August 11, 1958. Nor did the supplemental decision of September 30, 1958 change the rule announced in the first decision."

The point is that when a Federal oil and gas lease terminates or expires, the Secretary loses his jurisdiction over the subject matter, equitable or otherwise. *Champlin Oil & Refining Company, Joe N. Champlin*, 66 I.D. 26 (1959); *Memorandum Opinion* M-36631, Associate Solicitor, October 11, 1961 (relevant portion, *infra*, Appendix, p. 33, 36). The lease having died by the ending of its statutory term, it is obvious that no administrative action could reinstate it.

Since as a matter of law the lease ended and consequently there being no jurisdiction equitable or otherwise in the Secretary to exercise, the Secretary for plain lack of power could not decide to make the ruling prospective only. These petitioners have not been able to locate any decision dealing with prospective or retroactive application involving similar jurisdictional circumstances, and it is believed that the circumstances here present are quite unique. It is to be pointed out that the petitioners filed their applications for the sole reason that the Secretary had ruled that the extension of the particular lease (which established the law for all leases in a similar condition) was a nullity, that the lease had expired automatically and that the lands were available for a new lease.

(3) When the Secretary reruled that his first decision would after all be prospective only and not retroactive as he had first ruled, his reruling retroactively destroyed the intervening rights of the petitioners, for the petitioners in good faith reliance had already filed applications to lease. It is true that an applicant has no vested right to a lease but Sec. 17 of the Act, then codified as 30 U.S.C. section 226, conferred a valuable property right. The statute grants a mandatory statutory priority to the one who first files and if a lease is to be issued at all, it must be issued to the one who first applies. *Barash v. Seaton*, 256 F. 2d 714, 103 U.S. App. D. C. 159. The lands, of course, have been leased. This Court declared in *Chapman v. Sheridan-Wyoming Co.*, 338 U.S. 621 that broad discretionary power will not be upheld if it violates a property right or law. What the Secretary did in his second decision was in effect reinstate all those leases which he had first ruled as terminated. The Department has stated time and time again that reinstatement is subject to intervening rights secured by filing of an application or offer to lease. *McKenna, Lindsay*, 62 I.D. 376; *Olsen v. Simonson*, 27 L.D. 689; *Charles D. Edmonson, et al.*, 61 I.D. 355. Yet the Secretary here, without any prior notice or opportunity to be heard, proceeded to make a choice contrary to his own announced procedure and established precedent as to owners of intervening rights. As stated in the affidavit of Frances Lavender, an attorney in the Solicitor's office of the Department, which affidavit is a part of the record here presented and which was attached as an Appendix to the Secretary's brief below, the Secretary changed his first opinion in view of a large number of protests received by those affected by the first decision, but the Secretary did not see fit to give equal time or opportunity to the holders of intervening rights. The petitioners believe that the reinstatement of the leases by the second decision and the consequent destruction of intervening rights was a complete departure from precedent and the Court below sanctioned such a departure.

Additional grounds in support of the requested writ for certiorari, relied on below, are that the overruled advisory opinion did not amount to any settled or seasoned precedent. It lasted only slightly more than one year; it had not been arrived at in any actual case or controversy; it was subject to the same hazards as the opinion of any lawyer and was of "no

more binding effect or legal force than the opinion of any other lawyer." *United States v. Bennett*, 186 F. 2d 407 (Fifth Circuit). In *The Nature of the Judicial Process* (1921), Justice Cardozo expressed the thought, at pages 147, 148:

> "We will not help out a man who has trusted to the judgment of some inferior Court. In his case, the chance of miscalculation is felt to be a fair risk of the game of life, not different in degree from the risk of any other misconception of right or duty."

In *1, Administrative Law Treatise*, Davis, sec. 5.09, page 350, the view is expressed that it is "retroactive change of settled law, not retroactively settling of unsettled law" which may be unfair. In the *Chenery* case, *supra* at 332 U.S. 194, 203 this Court stated that "Every case of first impression has a retroactive effect" whether by a Court or an agency. No one is entitled to rely on erroneous opinions advanced by administrative employees. It must be pointed out that the filing of the assignments in the very last month to secure an extension was a free election; any lessee could have filed in the next to last month and there would have been no problem.

There is one further aspect of this dispute which needs to be mentioned. In its Brief below, the Secretary attempted at that late date to show some problems relating to the granting of two year extensions by approved partial assignments. What the Secretary did show, and which is true, is that considerable discussion and some confusion existed in the oil and gas industry, as to whether Congress ever really intended that a lease, completely undeveloped and never explored, should get a two year extension by merely assigning part of it. The confusion and uncertainty that existed revolved around the Amendatory Act of July, 1954, amending Sec. 30(a), 30 U.S.C. sec 187(a) (1958 ed.), which was the authority claimed for such an "unusual" extension. Suffice it to say, such an extension, by particular Act of Congress in 1960, is no longer available for leases issued after the amendatory act of 1960.

The respondents in the Court below indicated that one or more leases which were extended are now producing and to cancel such a lease now would be unfair. The petitioners do not expect any such windfall and in such a case, it is recognized that the owners of such production would have to be reimbursed for moneys fairly expended in securing such production.

For the above reasons, it is requested that the writ of certiorari issue.

Respectfully,

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Attorneys for Petitioners

August, 1962.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,646

LOUISE SAFARIH AND RICHARD P. DESMET, APPELLANTS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLEE

No. 16,647

RAYMOND J. HANSEN, ET AL., APPELLANTS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, ET AL., APPELLEES

No. 16,648

SAMUEL GARY, APPELLANT

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLEE

No. 16,649

JOHN J. KING, APPELLANT

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLEE

No. 16,650

ROBERT SCHULEIN, APPELLANT

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLEE

No. 16,651

BETTY J. LEWIS, ET AL., APPELLANTS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLEE

No. 16,654

DUNCAN MILLER, APPELLANT

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLEE

Appeals from the United States District Court
for the District of Columbia

Decided June 7, 1962

Mr. Thomas F. McKenna, with whom *Mr. Richard H. Speidel* was on the brief, for appellants in Nos. 16,646 and 16,647. *Mr. Joseph A. Sommer* also entered an appearance for appellants in Nos. 16,646 and 16,647.

Mr. James S. Holmberg, of the bar of the Supreme Court of Colorado, *pro hac vice*, by special leave of court with whom *Mr. Richard H. Spiedel* was on the brief, for appellants in Nos. 16,648, 16,649, 16,650 and 16,651.

Mr. Chester C. Shore for appellant in No. 16,654.

Mr. Raymond N. Zagone, Attorney, Department of Justice, of the bar of the Supreme Court of Texas, *pro hac vice*, by special leave of court, with whom *Assistant Attorney General Clark, Messrs. Roger P. Marquis* and *Thomas L. McKevitt*, Attorneys, Department of Justice, were on the brief, argued for appellee Udall in Nos. 16,646, 16,647 and 16,654, and submitted on the brief for appellee Udall in Nos. 16,648, 16,649, 16,650 and 16,651. *Messrs. S. Billingsley Hill* and *Hugh Nugent*, Attorneys, Department of Justice, also entered appearances for appellee Udall.

Mr. Henry T. Rathbun for appellee Robert S. Light, and certain other appellees in No. 16,647.

Mr. Samuel W. McIntosh for appellees Coll and Fasken in No. 16,647.

Mr. Samuel W. McIntosh filed a brief on behalf of Robert B. Laughlin, et al., as *amici curiae*, urging affirmance.

Before: PHILLIPS, Senior United States Circuit Judge for the Tenth Circuit,* EDGERTON and BAZELON, *Circuit Judges*.

PHILLIPS, *Circuit Judge*: In each of these cases relief by declaratory judgment was sought with respect to the denial by the Secretary of the Interior of applications made by appel-

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* Sitting by designation pursuant to §294(d), Title 28, U. S. Code.

lants for oil and gas leases under the Mineral Leasing Act of 1920, 41 Stat. 950. In each case a judgment was entered granting the Secretary's motion for summary judgment, denying a cross-motion for summary judgment and dismissing the action. These appeals followed.

Section 17 of the Mineral Leasing Act of 1920, 41 Stat. 437, 443, as amended by the Acts of August 8, 1946, 60 Stat. 950, 951, and July 29, 1954, 68 Stat. 583, 584, 30 U.S.C. §226, reads in part as follows:

> All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits may be leased by the Secretary of the Interior. * * * Leases issued under this section shall be for a primary term of five years and shall continue so long thereafter as oil or gas is produced in paying quantities.
>
> * * * * * *
>
> Upon the expiration of the initial five-year term of any noncompetitive lease maintained in accordance with applicable statutory requirements and regulations, the record titleholder thereof shall be entitled to a single extension of the lease, unless then otherwise provided by law, for such lands covered by it as are not on the expiration date of the lease withdrawn from leasing under this section. * * * A noncompetitive lease, as to lands not within the known geologic structure of a producing oil or gas field, shall be extended for a period of five years and so long thereafter as oil or gas is produced in paying quantities. A non-competitive lease, as to lands within the known geologic structure of a producing oil or gas field, shall be extended for a period of two years and so long thereafter as oil or gas is produced in paying quantities. * * *

Section 30(a) of the Mineral Leasing Act of 1920, added by the Act of August 8, 1946, 60 Stat. 950, 955, as amended by the Act of July 29, 1954, 68 Stat. 583, 585, 30 U.S.C. §187a, provided in pertinent part as follows:

> Notwithstanding anything to the contrary in section 30 hereof, any oil or gas lease issued under the authority

> of this Act may be assigned or subleased, as to all or part of the acreage included therein, subject to final approval by the Secretary and as to either a divided or undivided interest therein, to any person or persons qualified to own a lease under said sections, and any assignment or sublease shall take effect as of the first day of the lease month following the date of filing in the proper land office of three original executed counterparts thereof * * *. Any partial assignment of any lease shall segregate the assigned and retained portions thereof, and as above provided, release and discharge the assignor from all obligations thereafter accruing with respect to the assigned lands; and such segregated leases shall continue in full force and effect for the primary term of the original lease, but for not less than two years the date of discovery of oil or gas in paying quantities upon any other segregated portion of the lands originally subject to such lease. Assignments under this section may also be made of parts of leases which are in their extended term because of any provision of this Act. The segregated lease of any undeveloped lands shall continue in full force and effect for two years and so long thereafter as oil or gas is produced in paying quantities.

Part 192 of Title 43 of the Code of Federal Regulations sets forth the regulations pertaining to oil and gas leases.

43 C.F.R. §192.140 (1954 ed.) at all times here material provided in pertinent part:

> §192.140 *Assignments or transfers of leases or interests therein.* Leases may be assigned or subleased as to all or part of the leased acreage and as to either a divided or undivided interest therein to any person or persons qualified to hold a lease. Subject to final approval by the Bureau of Land Management, assignments or subleases shall take effect as of the first day of the lease month following the date of filing in the proper land office of all the papers required by §192.141 and 192.142. * * *

43 C.F.R. §192.144 (1954 ed.) provides:

> §192.144 *Extension of leases segregated by assignment.*

Any lease segregated by assignment, including the retained portion, shall continue in effect for the primary term of the original lease, or for two years after the date of discovery of oil or gas in paying quantities upon any other segregated portion of the original lease, whichever is the longer period.

(b) Undeveloped parts of leases assigned out of leases which are in their extended term under any provision of the act shall continue in effect for two years, and so long thereafter as oil or gas is produced in paying quantities.

It will be observed that §30(a) of the Mineral Leasing Act of 1920, as amended, provided that oil and gas leases may be assigned in whole or in part and that any assignment "shall take effect as of the first day of the lease month following the date of filing in the proper land office of three original executed counterparts thereof"; and that upon assignment the segregated lease of any undeveloped lands "shall continue in * * * effect for two years and so long thereafter as oil or gas is produced in paying quantities."

On June 4, 1957, as Associate Solicitor of the Department of the Interior, in a memorandum opinion, held an assignment filed in the proper land office in accordance with §30(a), as amended, supra, during the twelfth month of the last year of the extended term of a lease would effect a two-year extension of the extended term of the lease.

The applications for oil and gas leases made by the appellants and rejected by the Secretary embraced lands included in leases which had been made under the Mineral Leasing Act of 1920. All of such leases were for an original five-year term,[1] with a renewal right for an additional five years. Many of the lessees under such leases are not parties to any of these actions. With two exceptions, assignments of such leases had been made during the twelfth month of the last year of their extended terms, respectively, and prior to August 29, 1958, and the Bureau of Land Management had approved such assignments and recognized them as extending such leases for two

[1] Since the Mineral Leasing Act Revision of 1960, 74 Stat. 781, 782, such leases have a primary term of ten years.

years and reflected that fact on its records. In the two exceptions noted, the leases had been assigned prior to the last month of the extended terms of the leases.

In an appeal in the case of *Franco Western Oil Company*, 65 I.D. 316, decided August 11, 1958, the Secretary overruled the decision of June 4, 1957, of the Associate Solicitor and held that an assignment in order to effect a two-year extension of an oil and gas lease had to be made before the twelfth month of the last year of the extended term of the lease. Under such construction, the maximum extension obtainable was for one year and eleven months.

Thereafter, the Acting Director of the Bureau of Land Management requested clarification of the decision of August 11, 1958, insofar as it might affect noncompetitive oil and gas leases extended under the construction of §30(a) of the Mineral Leasing Act of 1920, as amended, supra, reflected in the opinion of the Associate Solicitor of June 4, 1957.

On September 30, 1958, the Secretary of the Interior handed down a supplemental decision in which he recited the fact that many partial assignments of leases had been filed during the last month of the extended-lease term in reliance on the opinion of June 4, 1957, and had been recognized by the Bureau of Land Management as effecting extensions of the terms of such leases for two years, that at the time of the decision of August 11, 1958, other leases in the twelfth month of their extended term were held by lessees who intended to make partial assignments thereof on the strength of the opinion of June 4, 1957, and who, under that opinion, had until August 29, 1958, within which to file such assignments and that a retroactive application of the decision of August 11, 1958, would adversely affect parties who had acted in reliance on such opinion and would deprive them of rights and interests they would be entitled to thereunder.

In such supplemental decision the Secretary stated that it had not been the practice of the Department of the Interior to give its decisions retroactive effect "so as to disturb actions taken in other cases on an overruled interpretation of the law" and referred to a number of decisions in which the Department had overruled former decisions and avoided nullifying actions

taken under such earlier decisions by giving its later decisions only prospective operation. In the supplemental decision, the Secretary held that partial assignments of leases made in the last month of the extended lease terms, if filed on or before August 29, 1958, would be treated as valid and as effecting two-year extensions of the terms of such leases.

While the period between the Solicitor's opinion of June 4, 1957, and the decision of the Secretary of the Interior of August 11, 1958, overruling such prior opinion was not long, in that interim persons, acting in reliance on the Solicitor's opinion and the uniform practice of the Bureau of Land Management during that interim of following such opinion, approving assignments of leases made during the last month of the lease term and reflecting extensions of such leases on its records, had made assignments of hundreds of leases affecting thousands of persons and no doubt in many cases lessees and assignees had expended substantial sums in exploration and development prior to August 11, 1958.

In Nos. 16,646 and 16,647 the appellants sought a judgment declaring that their offers to lease should not have been rejected on the ground that the lands embraced in the offers were included in existing oil and gas leases extended by partial assignments and that the appellants were entitled to leases "based upon" their offers.

In Nos. 16,648, 16,649, 16,650 and 16,651 appellants prayed that the court declare partial assignments of prior oil and gas leases filed during the last month of the last year of the lease terms were ineffective and that such prior leases had expired at the end of their terms by operation of law; and that the court reverse the decisions of the Secretary of the Interior denying them relief on the ground that the lands sought to be released were subject to prior leases and direct the Secretary to issue leases for the lands embraced in their offers.

In No. 16,654 the appellant prayed that the court set aside the decisions of the Secretary of the Interior rejecting his offers to lease and direct the Secretary to cancel all leases conflicting with his offers to lease and to award leases to appellant

In No. 16,6479 the record holders or assignees of four leases were permitted to intervene as parties defendant.

A large number of lawyers representing clients interested in the litigation filed, with leave of court, a consolidated brief as amici curiae in which they urged that the Secretary's supplemental decision of September 30, 1958, be sustained.

The primary question presented in these cases is whether, under the existing facts and circumstances, the Secretary had authority to make the construction of §30(a), as amended, supra, reflected in his decision of August 11, 1958, operate only prospectively.

It should be kept in mind that these are not cases where private persons are asserting rights to the detriment of the United States based on claims in the nature of an estoppel predicated on the actions of public officials, rather, they are cases where to give retroactive effect to the Secretary's decision of August 11, 1958, would give to the members of one group of private persons unfair and inequitable advantages to the detriment of members of another group of private persons and where such retroactive effect is not necessary to protect the interests of the United States.

Neither §30(a), as amended, supra, nor any other provision of the Mineral Leasing Act of 1920, expressly or by necessary or impelling implication provides that an assignment of an oil and gas lease made in the last month of the last year of the term of the lease, although not having operating effect until the first day of the succeeding month, shall be ineffectual as an assignment of the lease and as an extension of the term for a period of two years. In other words, it is not clear that Congress intended that the imperceptible instant of time intervening between the termination of the lease term and the effective date of the assignment should render ineffectual such assignment. It was the administrative practice under the Leasing Act, in order to facilitate administration with respect to rental payments, times of expiration of leases and other like matters, to have lease terms begin on the first day of a month and terminate on the last day of the month. It is not unreasonable to assume that the purpose of the provision in §30(a), as amended, supra, that an assignment or sublease should take effect as of the first day of the month following the date of

the filing in the proper land office was to facilitate administration, rather than limit extensions of lease terms by such assignments to not more than one year and eleven months after the expiration of the lease term. Accordingly, while we accept the construction of the Secretary in the decision of August 11, 1958, we are of the opinion that the pertinent provisions of the Leasing Act were reasonably open to the construction reached by the Assistant Solicitor by his opinion of June 4, 1957.

Where the Department of the Interior has decided that a statute should be given a different interpretation than that reflected by its earlier decisions and that such decisions should be overruled, it has been a rule in the Department since at least as far back as 1917 not to give its later decisions retroactive effect, especially when to do so would adversely affect actions taken and rights and interests acquired by private persons on the faith of the earlier decisions and would inure to the benefit of other private persons.[2]

Since the interpretation of §30(a), as amended, supra, reflected in the opinion of the Assistant Solicitor, was not a nonpermissible or an unreasonable one; because of that opinion, the practice by the Bureau of Land Management in following such opinion, and the practice of the Department, where the facts and circumstances were like those present in the instant cases, not to give retroactive effect to a decision overruling a former decision, lessees and assignees of leases, who on the strength of the Solicitor's opinion had made and acquired, respectively, assignments of leases in the last month of the ex-

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[2] See *Franco Western Oil Company*, 65 I.D. 427, 429, 430, 431 (1958); *Extension of Oil and Gas Lease Pursuant to Acts of December 22, 1943, and September 27, 1944, Where Leased Lands are Partly Within Known Producing Structure*, 58 I.D. 766, 774 (1944); the last cited decision was followed in *Anna R. Pahl A-24350* (1947); and that decision was upheld by the District Court for the District of Columbia in *Anna R. Pahl* v. *Marion Clawson*, Director of the Bureau of Land Management, and *Oscar L. Chapman*, Secretary of the Interior, Civil Number 3309-48, unreported (see 65 I.D. 430, 431); *Rights-of-Way Across Tribal and Allotted Indian Lands on the Flathead Reservation, Montana*, 58 I.D. 319, 330, 331; *Timothy Sullivan, Guardian of Juanita Elsenpeter*, 46 L.D. 110, 119 (1917).

Such rule of prospective operation has been followed by other administrative agencies. See 1 Davis, *Administrative Law Treatise* (1958) §5.09, pp. 350-352.

tended term, or who, in August 1957, intended to make and acquire assignments of leases in the last month of their extended term, were justified in assuming that the construction of §30(a), as amended, supra, by the Assistant Solicitor was correct and in the event it should be overruled by a later decision, such overruling decision would be given prospective operation only.

The administration of the public lands and the Acts of Congress with respect thereto and matters having to do with the development of such lands and the management and care of the interests of the United States therein, including the making and performance of contracts and leases affecting such lands, have been entrusted by the Congress to the Department of the Interior.

Necessarily, persons who have acquired oil and gas leases of public lands from the United States, in making assignments or subleases to other persons, in obtaining extensions of such leases, in performing the terms of such leases, in entering into contracts with third persons with respect to the exploration and development of such leases, in incurring liabilities and making expenditures in connection with the exploration, development and operation of such leases and in otherwise acting with respect to such leases, must in most cases act and rely upon interpretative regulations promulgated by, and decisions and opinions of the Department of the Interior interpreting applicable statutes and regulations, because ordinarily authoritative interpretations by court decisions are not available and lessees cannot postpone action awaiting adjudication of such matters in the courts.

It is a general rule that a decision of a court overruling an earlier decision is retrospective, as well as prospective, in its operation.[3]

However, the general rule is subject to a well-settled exception that courts ordinarily will give prospective effect only

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[3] *Groner* v. *United States*, 8 Cir., 73 F.2d 126, 130; *Ruppert* v *Ruppert*, App. D.C., 134 F.2d 497, 500; *Jackson* v. *Harris*, 10 Cir., 43 F.2d 513, 516; *Legg's Estate* v. *Commissioner of Internal Revenue*, 4 Cir., 114 F.2d 760, 764; *Peterson* v. *John Hancock Mut. Life Ins. Co.*, 8 Cir., 116 F.2d 148, 151; *Sunray Oil Co.* v. *Commissioner of Internal Revenue*, 10 Cir., 147 F.2d 962, 963, c.d. 325 U.S. 861.

to a decision overruling prior decisions where persons have contracted, acquired rights, or acted in reliance on the prior decision, and the operation of the later decision retrospectively would result in substantial harm to such persons.[4]

The power of a court to make its decisions operate only prospectively "whenever injustice or hardship will thereby be averted" is undoubted.[5]

It is obvious that the Secretary of the Interior, in carrying out his functions in the administration and management of the public lands, must be accorded a wide area of discretion and it is a well-recognized rule that administrative action taken by him will not be disturbed by a court unless it is clearly wrong.[6]

We conclude that the Secretary of the Interior, under facts and circumstances like those present in the instant cases, should have and does have authority, when he promulgates an interpretative regulation, or hands down a decision placing a different construction on a statute or regulation from that laid down in an earlier decision or regulation, to give prospective operation only to the later regulation or decision.

The Secretary's brief contends that dismissal of the suits was also proper because of the absence of the lessees, who are indispensable parties. We do not reach that question.

The judgments are severally affirmed.

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[4] *Jackson* v. *Harris*, 10 Cir., 43 F.2d 513, 516; *Gt. Northern Ry.* v. *Sunburst Co.*, 287 U.S. 358, 364; *The City* v. *Lamson*, 76 U.S. 477, 485; *Mercantile Nat. Bank* v. *Lander*, C.C.N.D. Ohio, 109 F. 21, 26; *Ruppert* v. *Ruppert*, App. D.C., 134 F.2d 497, 500; *Watring* v. *Volpoys*, App. D.C., 122 F.2d 642, 645, c.d. 314 U.S. 678; *Collins* v. *Webb*, D.C.N.D. Cal., 133 F. Supp. 877, 879. Also see *Montana Horse Products Co.* v. *Great Northern Ry. Co.*, —— Mont. ——, 7 P.2d 919, 927.

[5] *Gt. Northern Ry.* v. *Sunburst Co.*, 287 U.S. 358, 364; *Massaglia* v. *Commissioner of Internal Revenue*, 10 Cir., 286 F.2d 258, 261; *Collins* v. *Webb*, D.C.N.D. Cal., 133 F.Supp. 877; *Mercantile Nat. Bank* v. *Lander*, C.C.N.D. Ohio, 109 F. 21, 26.

[6] *McKenna* v. *Seaton*, App. D.C., 259 F.2d 780, 784, c.d. 358 U.S. 835.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed June 7, 1962

No. 16,646 — September Term, 1961

Louise Safarik and
Richard P. DeSmet,
Appellants,
v.
Stewart L. Udall,
Secretary of the Interior,
Appellee.

Civil 1081-61

No. 16,647 — September Term, 1961

Raymond J. Hansen, et al.,
Appellants,
v.
Stewart L. Udall,
Secretary of the Interior,
Appellee.

Civil 3902-60

No. 16,648 — September Term, 1961

Samuel Gary,
Appellant,
v.
Stewart L. Udall,
Secretary of the Interior,
Appellee.

Civil 1202-61

No. 16,649 — September Term, 1961

John J. King,
Appellant,
v.
Stewart L. Udall,
Secretary of the Interior,
Appellee.

Civil 3903-60

No. 16,650 — September Term, 1961

Robert Schulein,
Appellant,
v.
Stewart L. Udall,
Secretary of the Interior,
Appellee.

Civil 4131-60

No. 16,651 — September Term, 1961.
Betty J. Lewis, et al., — Civil 3904-60
Appellants,
v.
Stewart L. Udall,
Secretary of the Interior,
Appellee.

No. 16,654 — September Term, 1961.
Duncan Miller, — Civil 3470-60
Appellant,
v.
Stewart L. Udall,
Secretary of the Interior,
Appellee.

Appeals from the United States District Court for the District of Columbia.

Before: Phillips, Senior United States Circuit Judge for the Tenth Circuit, and Edgerton and Bazelon, Circuit Judges.

JUDGMENT

These appeals came on to be heard on the records on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the judgments of the District Court appealed from in these cases are affirmed.

It is further ORDERED by the court that in case No. 16,647 appellees Robert S. Light, et al. and appellees Lillian Hinkle Coll and David Fasken recover from appellants the taxable cost of printing their respective briefs, and have execution therefor.

Per Senior Circuit Judge Phillips.

ORIE L. PHILLIPS.

Dated: June 7, 1962
(Seal)
JOSEPH W. STEWART, Clerk,
United States Court of Appeals
for the District of Columbia Circuit.
By: James N. Menendez, Deputy Clerk.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington 25, D. C.

A-28163 — Decided November 16, 1959

Mike Abraham : Santa Fe 079715, 079716 and 079130

: Partial assignments of oil and gas leases held ineffective to extend the leases.

: Affirmed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Mike Abraham has appealed to the Secretary of the Interior from a decision of the Acting Director, Bureau of Land Management, dated May 21, 1959. That decision affirmed three separate decisions of the manager of the Santa Fe land office dated January 5, 1959, holding that partial assignments of three oil and gas leases were ineffective to extend the leases and that the leases had expired by operation of law. The Director held further that erroneous information furnished by Bureau personnel cannot operate to vest in the appellant a right unauthorized by law.

The leases, Santa Fe 079715, 079716, and 079130, were issued as of October 1, 1948, for primary terms of 5 years. Extensions of the leases for additional 5-year periods were granted under the provisions of section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., Supp. V, sec. 226). On September 22, 1958, in the twelfth month of the tenth year of each lease, partial assignments of the leases from Delta Oil Company of Utah, the then record titleholder of the leases, to Abraham were filed.

In refusing to recognize the assignments, the manager relied upon the departmental decision of August 11, 1958, in *Franco Western Oil Company et al.*, 65 I.D. 316, construing section 30(a) of the Mineral Leasing Act, as amended (30 U. S. C., 1952 ed., Supp. V, sec. 187a), and on the supplemental decision in that case rendered on September 30, 1958 (65 I. D. 427). In

the first decision it was held that for a lease to become segregated through partial assignment, and thus entitled to the extension authorized by section 30(a) with respect to segregated leases covering undeveloped lands, the assignment must be filed when there is at least one lease month remaining in the term of the lease and that a partial assignment filed during the last month of the lease term cannot become effective to segregate the lease and to entitle the segregated portions to another extension. There, the Department overruled a previous construction of the statute under which partial assignments filed during the twelfth month of the tenth year of oil and gas leases were deemed to extend the segregated leases. In its supplemental decision, the Department held that its first decision was to have prospective application only and that actions previously taken in extending oil and gas leases under the overruled interpretation of the statute would not be disturbed.

In his appeal to the Secretary, Abraham repeats his contention made to the Director that he was ready to file the assignments in late August 1958, and that he would have filed them then had it not been for the advice of the manager that he had until the last day of the lease terms, September 30, 1958, within which to file the assignments and secure extensions of the segregated leases. He also argues that it is inequitable to allow assignments filed prior to August 29, 1958, during the twelfth month of the tenth year of the lease terms, to stand while denying effectiveness to assignments filed prior to September 30, 1958, during the twelfth month of the tenth year of such leases.

Abraham's first argument is contradicted by the case records. They show that two of the partial assignments in question were executed by the record titleholder on September 8, 1958, and the third, on September 18, 1958, and that Abraham did not execute his separate requests for approval of the assignments until those dates. In any event, the rule with respect to the consequences of relying upon erroneous advice given by Bureau personnel is as stated by the Acting Director. The Department is not bound or estopped by such erroneous advice. *Cf. Utah Power and Light Company* v. *United States*, 243 U. S. 389, 408, 409 (1917); *United States* v. *City and County of San Francisco*, 310 U. S. 16, 31, 32 (1940).

The appellant's second argument is apparently based on his assertion that the first *Franco Western* decision was not necessarily conclusive because the final position of the Department was not crystalized until September 30, 1958, and on his contention that if, by its supplemental decision, the Department could allow the assignment involved in that case to stand (which assignment had been approved by the manager on June 28, 1957, thus extending the segregated leases for an additional 2-year period from July 1, 1957), an additional period, following September 30, 1958, should be provided to allow the parties who were depending upon the overruled interpretation of the section to accommodate themselves to the changed interpretation thereof.

It is apparent from appellant's argument that he does not fully understand the *Franco Western* decisions. The first decision followed a 1955 holding of the Department that under section 30(a) of the Mineral Leasing Act, as added by the act of August 8, 1946 (30 U. S. C., 1952 ed., sec. 187a), the first day of the lease month following the filing of an assignment is the earliest date upon which an assignment can take effect. *Albert C. Massa et al.*, 62 I. D. 339. It then examined the 1954 amendment of section 30(a), which permits assignments of portions of oil and gas leases which are in their 5-year extended terms and provides that the segregated leases of undeveloped lands resulting from such assignments shall continue in full force and effect for 2 years and so long thereafter as oil or gas is produced in paying quantities, and determined that the assigned and retained portions of the base lease become separate leases on the effective date of the assignment, provided the assignment is ultimately approved. It determined, following the plain wording of the section as to when assignments shall take effect, that unless there is at least one full lease month remaining in the term of the base lease when a partial assignment thereof is filed there is no date on which the assignment can take effect and that, in such a situation, the lease would terminate by operation of law prior to the date on which the assignment would otherwise become effective.

There is nothing inconclusive about the decision of August 11, 1958. Nor did the supplemental decision of September 30, 1958, change the rule announced in the first decision. It merely

held that leases which had, prior to August 11, 1958, been extended under the overruled opinion would not be disturbed. It also provided for the recognition of partial assignments filed on or before August 29, 1958, when those leases out of which the assignments were made were in their twelfth month of the tenth year of their extended term during the month of August 1958. This was done because these leases had entered the twelfth month of the tenth year of their extended term prior to the decision of August 11, 1958.

Upon consideration of the fact that many leases had been, prior to August 11, 1958, extended on the basis of the overruled interpretation of section 30 (a), it seemed only fair to recognize the extension granted by the manager to the leases directly involved in the first *Franco Western* decision.

There is no reason, however, to apply the construction of the section overruled by the decision of August 11, 1958, to leases which were in the twelfth month of the tenth year of their extended terms in September 1958, or thereafter. To do so would be contrary to what the Department believed on August 11, 1958, and subsequently to be the correct interpretation of the section.

Accordingly, it was proper to hold that partial assignments of oil and gas leases Santa Fe 079715, 079716, and 079130, filed on September 22, 1958, never became effective and that those leases expired by operation of law on September 30, 1958.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A (4) (a), Departmental Manual; 24 F. R. 1348), the decision of the Acting Director of the Bureau of Land Management of May 21, 1959, is affirmed.

(Sgd) EDMUND T. FRITZ,
Deputy Solicitor

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington 25, D. C.

M-36631 October 11, 1961

Memorandum

To: Director, Bureau of Land Management

From: Associate Solicitor, Division of Public Lands

Subject: Leases automatically terminated by operation of law under section 31 of the Mineral Leasing Act (30 U. S. C. sec. 188).

A number of cases concerning timely payment of advance rentals on oil and gas leases have arisen in the Cheyenne, Wyoming, Land Office. These cases fall primarily into two types of factual situations: (1) where the rental payment was insufficient in amount as a result of the lessee's reliance on an erroneous billing from the Bureau and (2) where the rental payment was made by a check which was not honored on the first presentation.

I.

In consideration of the problem of whether the erroneous billing by the Bureau of Land Management would excuse a lessee from the payment in advance of the full rental, we must start with the pertinent statutory language. The closing sentence in section 31 of the Mineral Leasing Act (30 U. S. C., sec. 188) is clear and unequivocal: " . . . upon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law . . . " *The essence of this provision is that the termination is automatic; it is by operation of law, and no officer of the United States is involved in the termination.* If the rental payment is made in advance, the lease continues; if the rental payment is not made, the lease terminates. *The Secretary of the Interior, despite his general authority over leases, has no part in the termination process. He has no equitable authority to condone failures to make payment even when exonerating circumstances are shown to exist. The statute is self-operating, and, if the rental is not paid on the*

anniversary date, the lease simply terminates. Champlin Oil and Refining Co., 66 I. D. 26 (1959).

The provision quoted above was added to section 31 by paragraph (7) of the Act of July 29, 1954 (P. L. 83-555; 68 Stat. 583), because of the widespread criticism of the Department's practice of cancelling a lease administratively whenever the rental was not paid in advance and of them bringing suit in the Federal courts to collect the delinquent rentals. From the time when the Mineral Leasing Act of February 25, 1920 (41 Stat. 437), was first enacted, and through various amendments, section 17 (30 U. S. C. sec. 226) has provided that rentals must be paid in advance.

While there are no cases directly in point, some basic guidelines on the question of termination have been established. A tender of rental after a lease has terminated and the acceptance of such tender cannot serve to reinstate the lease. *Champlin Oil and Refining Company, supra.* The rental payment must be received on or before the anniversary date. Placing the rental payment in the United States mails in sufficient time to reach the Land Office under ordinary circumstances is not sufficient. *Virginia I. Gail*, A-27670, September 25, 1958; *Mike Abraham*, A-27763, December 22, 1958. The payment not only must be received on or before the anniversary date of the lease, but the payment must also be accompanied by sufficient identification so that it may be properly credited to the account of the lessee. *Howard Arndt*, A-27895, April 20, 1959. However, when a payment has been timely tendered with proper identification by the lessee, the payment may not be defected by an erroneous refusal to accept such payment or by the erroneous return of such payment to the lessee. *H. E. Stuckenhoff et al.*, 67 I. D. 285.[1]

In view of these factors, it is clear that, in order to hold that in the 85 cases under consideration the leases did not ter-

[1] The only other situations where a lease has not been held to have terminated for failure to pay full rental in advance have involved a lessee's failure to pay the seventh year's rental prior to the seventh anniversary date when notice of the of the approval of the extension of his lease had not been received before the end of the sixth year. *Transco Oil and Gas Corporation*, A-28363, August 2, 1960; M-36458, 64 I. D. 333. The language of these holdings clearly indicates that the results were based on the fact that extensions, rather than the ordinary payment of rentals, were involved.

minate, it will be necessary to hold that the rental in each case was paid, if not actually, then at least constructively. Normally, the payment of a specified sum is deemed to be complete only when the sum has been tendered and accepted, but it is questionable that we may assert that payment has not been completed where the payee has refused a proper tender. It was on this theory that in the *Stuckenhoff* case it was held that proper payment may not be defected by an erroneous refusal to accept it when properly tendered. Where the lessee has done all within his power to comply with the terms of the contract, and the payment is not completed through no fault of his own, the payment may still be regarded as having been made constructively.

In the type of case which we are considering the lessee did not do all in his power to complete the payment. He was not prevented by the lessor from paying the full rental, though he was, as a result of incorrect information, misled into paying the wrong amount. Although the billing from the Bureau of Land Management gave an incorrect figure as the payment due, the lessee had signed his lease and had a copy of it which set forth the payment actually due. While perhaps hindered, he was not prevented from tendering the proper payment. If he had tendered the proper payment, and a portion of it had thereafter been mistakenly refunded by the Bureau, the lease would, under the *Stuckenhoff* ruling, not have been automatically terminated. Here, however, we cannot say that the lessee at any time tendered the correct rental. Consequently, his lease terminated for failure to pay rental in advance. Indeed, it may be said that the true reason why the lessee failed to pay the proper amount was his ignorance of the terms of the lease. Ignorance of these terms cannot be held to excuse compliance with them. *H. R. Patterson*, A-27745, November 19, 1958.

The United States may not be estopped by the unauthorized actions of its employees. This is a fundamental rule of law. *Utah Power & Light Company* v. *United States*, 243 U. S. 389 (1917); *Wilber National Bank* v. *United States*, 294 U. S. 120 (1935). No one at the Cheyenne land office which sent out these erroneous billings was empowered to establish different rental rates. Only the Secretary could do that, and his discretion in the establishment of rentals was strictly limited by the

provisions of the statute. The figures set forth in the erroneous billings could not be accepted as the proper rentals due because they were made without any authority whatsoever.

It is true that the legislative history of the automatic termination provision reveals that it was intended to benefit lessees, and not, as it does in this case, to impose hardship on them. However, the legislative history also indicates that it was believed that absolutely automatic termination by operation of law, without any action by the Secretary would be on the whole beneficial to both lessor and lessee. To render the termination process anything less than automatic would appear to run counter to the expressed purpose of the statute.

There is, furthermore, no possibility of restoring the lease by administrative action. Only by the enactment of a new statute can a terminated lease be made effective once more. As we have recently held, the *bona fide* purchaser provisions of section 27 of the Mineral Leasing Act (30 U.S.C., sec. 184) are not applicable where a lease terminates by action of law, though they are applicable where there are proceedings to cancel or forfeit a lease. M-36627, October 9, 1961. Furthermore, the fact that a lessee may remain on the land after termination of his lease and obtain production is immaterial. *Champlin Oil and Refining Co., supra.*

It is recognized that the result which we have reached is harsh. There is apparently no doubt that the Bureau's employees misled the lessees as to the amount of rental due. There is no doubt that reliance upon a billing from the lessor is natural and ought to be expected. Nevertheless, the law is clear and explicit: the leases have terminated for nonpayment of rentals, and cannot be restored by administrative action. Under the circumstances the Department appears to have a clear duty of preparing relief legislation (for the restoration of the terminated leases) and submitting it to the Congress. In the meantime no action should be taken to open these lands to leassing by other parties.

It would also seem wise for the Department to indicate on any billing sent out in the future that the terms of the lease rather than the figures in the billing establish the correct rental payment.

* * * * * *

(Sgd) THOMAS J. CAVANAUGH,
Associate Solicitor
Division of Public Lands


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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 379

RAYMOND J. HANSEN, ET AL., PETITIONERS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, AND ROBERT S. LIGHT, ET AL.

LOUISE SAFARIK, ET AL., PETITIONERS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15–26) is reported at 304 F. 2d 944. The district court did not write an opinion.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1962 (Pet. App. 27–28). The petition for a writ of certiorari was filed on August 27, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Secretary of the Interior ruled that, contrary to an earlier Department interpretation of the Mineral Leasing Act, an assignment of a lease will extend the term of the lease only if the assignment is made prior to the last month of the original term. The question presented is whether the Secretary of the Interior properly applied his subsequent interpretation only prospectively where a large number of leases were extended in reliance upon the earlier interpretation.

STATUTES AND REGULATIONS INVOLVED

Section 17 of the Mineral Leasing Act of 1920, 41 Stat. 437, 443, as amended by the Acts of August 8, 1946, 60 Stat. 950, 951, and July 29, 1954, 68 Stat. 583, 584, 30 U.S.C. 226, at the time appellants made their lease offers provided in pertinent part:

> All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits may be leased by the Secretary of the Interior. * * * Leases issued under this section shall be for a primary term of five years and shall continue so long thereafter as oil or gas is produced in paying quantities.
>
> * * * * * *
>
> Upon the expiration of the initial five-year term of any noncompetitive lease maintained in accordance with applicable statutory requirements and regulations, the record titleholder thereof shall be entitled to a single extension of the lease, unless then otherwise provided by law, for such lands covered by it as are not on the expiration date of the lease withdrawn from

> leasing under this section. * * * A noncompetitive lease, as to lands not within the known geologic structure of a producing oil or gas field, shall be extended for a period of five years and so long thereafter as oil or gas is produced in paying quantities. A noncompetitive lease, as to lands within the known geologic structure of a producing oil or gas field, shall be extended for a period of two years and so long thereafter as oil or gas is produced in paying quantities. * * *[1]

Section 30(a) of the Mineral Leasing Act of 1920, added by the Act of August 8, 1946, 60 Stat. 950, 955, and amended by the Act of July 29, 1954, 68 Stat. 583, 30 U.S.C. 187a, provided in pertinent part:

> Notwithstanding anything to the contrary in section 30 hereof, any oil or gas lease issued under the authority of this Act may be assigned or subleased, as to all or part of the acreage included therein, subject to final approval by the Secretary and as to either a divided or undivided interest therein, to any person or persons qualified to own a lease under this Act, and any assignment or sublease shall take effect as of the first day of the lease month following the date of filing in the proper land office of three original executed counterparts thereof * * *. Any partial assignment of any lease shall segregate the assigned and retained portions thereof, and as above provided, release and discharge the assignor from all obligations thereafter accruing with respect to the assigned lands; and such segregated leases shall continue

[1] Since the Mineral Leasing Act Revision of 1960, 74 Stat. 781, 782, these leases simply have a primary term of 10 years.

in full force and effect for the primary term of the original lease, but for not less than two years after the date of discovery of oil or gas in paying quantities upon any other segregated portion of the lands originally subject to such lease. Assignments under this section may also be made of parts of leases which are in their extended term because of any provision of this Act. The segregated lease of any undeveloped lands shall continue in full force and effect for two years and so long thereafter as oil or gas is produced in paying quantities.

Part 192 of Title 43 of the Code of Federal Regulations sets forth the regulations pertaining to oil and gas leases. 43 C.F.R. 192.140 (1954 ed.) at the time of petitioners' lease offers provided in pertinent part:

§ 192.140 *Assignments or transfers of leases or interests therein.* Leases may be assigned or subleased as to all or part of the leased acreage and as to either a divided or undivided interest therein to any person or persons qualified to hold a lease. Subject to final approval by the Bureau of Land Management, assignments or subleases shall take effect as of the first day of the lease month following the date of filing in the proper land office of all the papers required by §§ 192.141 and 192.142.

* * *

43 C.F.R. 192.144 (1954 ed.) provided:

§ 192.144 *Extensions of leases segregated by assignment.* (a) Any lease segregated by assignment, including the retained portion, shall continue in effect for the primary term of the original lease, or for two years after the date of discovery of oil or gas in paying quantities

upon any other segregated portion of the original lease, whichever is the longer period.

(b) Undeveloped parts of leases assigned out of leases which are in their extended term under any provision of the act shall continue in effect for two years, and so long thereafter as oil or gas is produced in paying quantities.

STATEMENT

Petitioners filed applications for oil and gas leases involving lands included in existing leases which had been extended for two years by assignments made during the twelfth month of the last year of the terms (R. 4, 29).[2] After the Secretary of the Interior denied the applications, petitioners brought this action for a declaratory judgment to review this determination. The facts giving rise to the actions may be summarized as follows:

Section 30(a) of the Mineral Leasing Act and the regulations pursuant thereto permitted the assignment of oil and gas leases, the assignment to "take effect as of the first day of the lease month following the date of filing in the proper land office * * *." Section 30(a) provides that such assignments run for at least two years even if the original lease would have expired earlier. In 1957 an Associate Solicitor of the Department of the Interior ruled that an assignment filed in the twelfth month of the last year of the lease term would effect a two-year extension of the lease term (R. 47–50). Numerous leases were extended under his interpretation.

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[2] "R." refers to the Joint Appendix in the court of appeals.

In 1958, the Secretary of the Interior decided that an assignment would have to have been filed prior to the twelfth month of the last year of the term in order to effect a two-year extension since the assignment is to take effect the first day of the following month. *Franco Western Oil Co.*, 65 I.D. 316 (R. 10). To avoid the harsh result of upsetting hundreds of leases extended under the earlier interpretation, the Secretary held in a supplemental decision that his subsequent interpretation would be applied prospectively only. *Franco Western Oil Co.*, 65 I.D. 427 (R. 16). The leases involved in petitioners' applications had been assigned during the final month of their term and prior to the time the Secretary had ruled that such applications would not in the future extend the lease. Since the lands involved were included in outstanding leases at the time petitioners' offers were filed, the Secretary denied the offers (R. 7–9, 36–43).

The district court granted the Secretary's motions for summary judgment, denied petitioners' cross-motions, and dismissed the complaints (R. 44, 56, 73). The court of appeals affirmed the dismissals on the grounds that the Act and regulations were reasonably open to both interpretations and that the Department of the Interior had discretion to decline to give retroactive application to changes in interpretations which would have inequitable results (Pet. App. 23–26).

ARGUMENT

1. Petitioners claim that the Mineral Leasing Act is "clear" (Pet. 2, 5, 7, 8, 9, 10)—that it does not allow assignments made during the twelfth month of the last year of the lease terms to extend the lease for two years. In fact, however, the Act, as well as the departmental regulations, do not specifically deal with this problem. In the absence of any clear statutory language, the Department of the Interior originally followed the practice of considering assignments in the last month of the lease as effecting a two-year extension of the lease. Subsequently, however, the Secretary of the Interior, as he stated, took "a different view" (R. 17) of the language of Section 30(a) and overruled the earlier interpretation.[3] In

[3] The Secretary's reasoning was as follows (R. 13–15):

"Section 30(a) provides that assignments may be made "subject to final approval by the Secretary" and that an assignment 'shall take effect as of the first day of the lease month following the date of filing of the assignment' in the proper land office. * * * .

"While the section provides that any partial assignment of any lease shall segregate the assigned and retained portions thereof, that provision must be read with the other language therein to mean, not that the assignment itself shall segregate the lands held under lease, but that the assigned and retained portions of the base lease shall become separate leases on the effective date of the assignment, provided the assignment is ultimately approved

"For the leases to become segregated, and thus be entitled to the extension provided for in the last sentence of the section, an assignment must have been filed while there is at least one full 'lease month' remaining in the term of the lease. Otherwise there is no first day of the lease month following the date of filing' upon which the assignment can take effect. Thus where the expiration date of a lease covering unde-

both of these interpretations the Department of Interior was "filling a gap" in the statute and regulations. While we believe that the second ruling is amply supported by the statute, we agree with the court of appeals[4] that it is not clearly demanded by

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veloped lands is the last day of the month in which an assignment of a portion thereof is filed, there is no 'first day of the lease month following the date of filing' upon which the assignment can take effect. In such a situation the lease will have terminated before the assignment can become effective and thus the assigned and retained portions of the base lease never ripen into segregated leases.

* * * * *

"The rule for computing time also requires that every day and every part of that day be considered, in contemplation of law, to be one day before the first moment of the next day, although the elapsed time is infinitesimal, and that if an act is to be performed after a certain day it cannot be performed until the whole of that day has elapsed. 86 C.J.S. Time § 16."

[4] The court of appeals analyzed the statute as follows (Pet. App. 23–24):

"Neither § 30(a), as amended, supra, nor any other provision of the Mineral Leasing Act of 1920, expressly or by necessary or impelling implication provides that an assignment of an oil and gas lease made in the last month of the last year of the term of the lease, although not having operating effect until the first day of the succeeding month, shall be ineffectual as an assignment of the lease and as an extension of the term for a period of two years. In other words, it is not clear that Congress intended that the imperceptible instant of time intervening between the termination of the lease term and the effective date of the assignment should render ineffectual such assignment. It was the administrative practice under the Leasing Act, in order to facilitate administration with respect to rental payments, times of expiration of leases and other like matters, to have lease terms begin on the first day of a month and terminate on the last day of the month. It is not unreasonable to assume that the purpose of the provision in § 30(a), as amended, supra, that an assign-

the statute itself—that, at the least, it is not so obvious that it must be applied retroactively so as to upset lease arrangements based on a contrary Department determination.

2. The courts have sanctioned authorized retroactive rulemaking by administrative agencies when the public ends sought to be accomplished outweigh the hardship imposed.[5] But we know of no case deciding that administrative agencies *must* give retroactive effect to their decisions, including interpretations of statutes and regulations. The power to rule prospectively has been exercised by the Secretary in numerous instances (see R. 17, 18). Likewise, the courts have the power, which they have frequently exercised, to rule prospectively to avoid hardship to persons who have relied on previous decisions (see Pet. App. 26).

As the court of appeals aptly concluded (Pet. App. 24–26):

> It is obvious that the Secretary of the Interior, in carrying out his functions in the administration and management of the public lands,

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ment or sublease should take effect as of the first day of the month following the date of the filing in the proper land office was to facilitate administration, rather than limit extensions of lease terms by such assignments to not more than one year and eleven months after the expiration of the lease term. Accordingly, while we accept the construction of the Secretary in the decision of August 11, 1958, we are of the opinion that the pertinent provisions of the Leasing Act were reasonably open to the construction reached by the Assistant Solicitor by his opinion of June 4, 1957."

[5] *Securities Comm'n* v. *Chenery Corp.*, 332 U.S. 194, 203; *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 620; *National Labor Relations Bd.* v. *Guy F. Atkinson Co.*, 195 F. 2d 141, 146–149 (C.A. 9).

> must be accorded a wide area of discretion and it is a well-recognized rule that administrative action taken by him will not be disturbed by a court unless it is clearly wrong.
>
> We conclude that the Secretary of the Interior, under facts and circumstances like those present in the instant cases, should have and does have authority, when he promulgates an interpretative regulation, or hands down a decision placing a different construction on a statute or regulation from that laid down in an earlier decision or regulation, to give prospective operation only to the later regulation or decision.

In short, we submit that the Secretary had discretion to rule prospectively and that the discretion is not abused where this is done in order to avoid serious hardship. Here, thousands of persons (see Pet. App. 22) had relied on the 1957 interpretation of the statute by paying for the assignment of leases during the last month and for exploration and development costs on the lands subject to these leases. Surely, the Secretary of the Interior could protect such persons from losses resulting from the Department's change of position.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.[6]

ARCHIBALD COX,
Solicitor General.
ROGER P. MARQUIS,
RAYMOND N. ZAGONE,
Attorneys.

SEPTEMBER 1962.

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[6] In the event the petition is granted, the Secretary of the Interior reserves the right to make the additional arguments, urged but not ruled upon below, that the lands involved were included in leases recorded on the tract books and were therefore not available for leasing at the time petitioners' applications were made, and that dismissal of the suits was also proper because of the absence of the lessees, who are indispensable parties.